No. SC86440

IN THE MISSOURI SUPREME COURT

In the Interest of:

S.M.H.,

a Minor Child.

SUBSTITUTE BRIEF OF RESPONDENT CHILDREN'S DIVISION

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STATEMENT OF FACTS

The transcripts of three hearings have been filed with this court. The nature of those hearings, the dates on which they were held, and how they will be cited throughout this brief follows:

- June 10 and June 12, 2002, hearing on jurisdiction and disposition (June 02 Tr.),
- September 22, 2003, hearing on father's motion for modification of custody (Sep. 03 Tr.), and
- December 12, 2003, and January 9, 2004, hearing on termination of parental rights (Dec. 03 Tr.).

A history of father's custody of his daughter will assist in understanding the facts of this case and the trial court's judgment terminating father's parental rights.

History of Father's Custody of His Daughter

Initial custody orders

The juvenile officer removed father's daughter from his and the mother's custody and filed a petition under § 211.031 on April 27, 2002. (L.F. 4, 5.) That day, the trial court placed the child in emergency protective custody with the Children's Division. (L.F. 8.) On May 3, after a protective custody hearing, the

trial court ordered the child to remain in protective custody and temporary legal custody to the Children's Division, but permitted father semi–monthly, supervised visitation. (L.F. 25, 28, 33.)

After the jurisdictional and dispositional hearings on June 10 and 12, 2002, the trial court on June 12 ordered temporary legal and physical custody of the child to the Children's Division for appropriate placement and found father to be an appropriate placement. (L.F. 79, 84, 91.) In its jurisdictional order of June 17, the trial court found the mother not to be an appropriate custodian because she had stated that she would kill herself and the child if father tried to take the child. (L.F. 84, 85, 86, 88.) The trial court also found that father did not believe the mother would harm the child or herself and that Dr. Daus had "intense concerns" about father's "long term parenting ability" and father's statements to him were at best inappropriate and at worst indicated poor psychological functioning. (L.F. 88.) In its dispositional order of June 17, the trial court entered another order finding father to be an appropriate placement for the child, but it did not permit the mother to visit the child at father's residence. (L.F. 93, 94, 96.)

Father places his daughter with the Deans

By July, father placed his daughter, who was then 7 months old, in the physical custody of James and Michelle Dean. (Dec. 03 Tr. 179, 200; Sep. 03 Tr.

87, 79, 109.) The Children's Division learned of this placement in September. (Sep. 03 Tr. 79.) The Deans were not licensed foster parents and never received a foster care subsidy from the state. (Sep. 03 Tr. 85, 90.) Father had met the Deans through a real estate transaction. (Sep. 03 Tr. 87.) They were sitting the child, and because father's schedule required him to remove his daughter from the Deans late at night and to return her there the next day, eventually the arrangement evolved into the child's living with them. (Sep. 03 Tr. 87.) By October, Michelle Dean realized that father wanted the child to stay with her because he wanted his daughter to be with a mother; eventually father told Michelle that he wanted her to raise his daughter. (Sep. 03 Tr. 88–89.) When the Deans learned that, they wanted to become guardians of the child, and father agreed, at first, but only after he obtained custody. (Sep. 03 Tr. 89.)

In its review order of October 22, the trial court found that the mother remained an inappropriate placement[1] and that father remained an appropriate placement for the child, but because father had only partially progressed toward

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[1]The trial court continued to find the mother to be an inappropriate placement for her daughter in its subsequent review orders of February 13 and August 11, 2003. (L.F. 151, 153, 158, 222, 224, 229.)

eliminating the conditions that caused removal of the child from the home, temporary legal custody of the child remained with the Children's Division for appropriate placement that may or may not be father. (L.F. 117, 119, 120, 122, 124.) In the event that the Children's Division determined not to place the child with father, the trial court allowed father unsupervised visitation two day per week with one intervening overnight visitation to coincide with father's scheduled days off. (L.F. 123.) The trial court also ordered father to financially support the child. (L.F. 123.) The Children's Division did not place the child with father and removed the child from the Deans. (Sep. 03 Tr. 89.)

On December 23, all the parties agreed and the trial court ordered that father was an appropriate placement for his daughter "so long as he resides with the Deans" and terminated father's child support obligation. (L.F. 140.) Father returned his daughter to the Deans and lived with them, though he also spent time at the home of a friend, particularly after March of 2003 when the mother returned to Missouri. (Sep. 03 Tr. 89, 95.) When father was living with his friend, he spent only 3 hours a day at the Deans. (Sep. 03 Tr. 110.)

Father removes his daughter from the Deans

On a Sunday in June 2003, father removed his daughter from the Dean residence. (Sep. 03 Tr. 92; Dec. 03 Tr. 192–193.) "She was sound asleep when

he grabbed her from the crib naked and removed her from the home." (Dec. 03 Tr. 193.) Father and Michelle Dean got into an argument over father's threats to her that he and his daughter were a "package deal" — "If you're not nice to me and a bitch to me, then I'm going to take the baby." (Sep. 03 Tr. 96, 106.) Michelle did not want father to "pop in and pop out of my home" whenever he wanted or for father to become a part of her family. (Sep. 03 Tr. 107.)

When father took his daughter from the Deans, he did not tell them where he was going nor did he return to their house. (Sep. 03 Tr. 92, 95.) Father did not tell the Children's Division that he was removing his daughter, but rather that he and the mother were working together to raise the child. (Sep. 03 Tr. 41–42, 52.) On June 12, the Children's Division learned in a telephone call from father's sister that father had removed his daughter, but it did not learn to where until it received a child abuse and neglect hotline telephone call that day that reported the child was at the mother's. (Sep. 03 53.) At that time, the Children's Division thought that the child was on an authorized, unsupervised day visit with her mother, which it had approved on June 5. (Sep. 03 Tr. 19, 53.) On June 17, the Children's Division learned from Michelle Dean that the child was at the mother's, but when it went to her residence, it was told that the child was not there. (Sep. 03 Tr. 53.)

Father told James Dean, a few days after father removed his daughter, that he took her to her mother's. (Sep. 03 Tr. 93.) James asked to visit the child, and father suggested that she stay with the Deans for the weekend that the mother was going on a float trip. (Sep. 03 Tr. 93.) After the trip, when the mother came to pick the child up, she decided to leave her with the Deans. (Sep. 03 Tr. 94.) That night, father agreed to the child's remaining with the Deans. (Sep. 03 94.) In all, the child was with the mother for two weeks in June. (Sep. 03 38.)

Father's motion to change custody of his daughter

After his daughter was returned to the Deans, on June 25, the trial court allowed father two supervised visits and thereafter, unsupervised day visits unless the Children's Division or the guardian ad litem filed with the court reasons visits should remain supervised. (L.F. 200.) The trial court also ordered the Children's Division to file a petition for guardianship. (L.F. 200.) At first, father agreed to a guardianship, but then changed his mind, and the Deans did not want to be involved in a contested guardianship, so the Division did not file a guardianship petition. (Sep. 03 Tr. 82–83, 126–127.)

In its review order of August 11, 2003, the trial court ordered the permanency plan to be termination and adoption and the Children's Division to file a petition for termination of parental rights. (L.F. 222, 227, 229.) On September 8,

the Division filed a termination petition. (L.F. 234.) On September 15, father filed his motion to terminate legal and physical custody of his daughter with the Children's Division. (L.F. 242.) The trial court heard that motion on September 22 and overruled it on October 8. (L.F. 259, 272, 319.)

At the hearing on his motion for modification of custody, father admitted that he took his daughter to her mother's in June of 2003 and left the Deans, that the June 5 family support team meeting that authorized unsupervised visits with the mother did not authorize overnight visits, that the December 23, 2002, court order found him to be an appropriate placement so long as he resides with the Deans, that he was no longer an appropriate placement when he stopped residing with the Deans, and that the mother was living with her boyfriend when he took his daughter to her. (Sep. 03 Tr. 21, 36, 37, 39.) Father told the social service worker that moving his daughter from the Deans to her mother's was a violation of the court's order that her mother was an inappropriate placement, but that he had no regard for the order because his daughter should never have been removed from his and the mother's home in the first place. (Sep. 03 Tr. 37, 54.)

ARGUMENT

I.

The trial court had jurisdiction to hear the petition to terminate parental rights because under Rule 126.01(c), after the trial court entered the dispositional order, father no longer had a peremptory right to a change of judge. (Responds to father's Argument I.)

A timely filed motion for change of judicial officer under Rule 126.01 divests the trial court of jurisdiction. *State ex rel. Stubblefield v. Bader*, 66 S.W.3d 741, 742 (Mo. banc 2002); *State ex rel. L.B. v. Frawley*, 2004 WL 1191661 (Mo. App. E.D. June 1, 2004); *State ex rel. Bailey v. Frawley*, 72 S.W.3d 614, 615 (Mo. App. E.D. 2002) (disqualification motions timely filed in all three cases after protective custody hearing and before dispositional hearing). But a motion for change of judicial officer under Rule 126.01 does not even lie after a dispositional order has been entered.

Rule 126.01(c) is similar to Rule 51.05(a). Under the latter rule, amended in 1994, "motions to modify child custody, child support, or spousal maintenance filed under chapter 452, RSMo, shall not be deemed to be an independent civil action" unless the judge designated to rule on the motion is not the same judge who

ruled on the previous action. Rule 51.05(a); Respondent's Separate Appendix (Resp't Sep. App.) A2. Though motions to modify child custody orders are in fact independent civil actions and under case law a party is entitled to a change of judge to hear such a motion, under the rule a party's right to a change of judge is limited after a child custody order has been entered. *See Wilson v. Sullivan*, 967 S.W.2d 225, 227–28 (Mo. App. E.D. 1998). After a child custody order has been entered, a party does not have a peremptory right to a change of judge. *See State ex rel. Thexton v. Killebrew*, 25 S.W.3d 167, 170 (Mo. App. S.D. 2000).

Likewise, petitions to terminate parental rights are independent civil actions. *See State ex rel. Brault v. Kyser*, 562 S.W.2d 172, 174 (Mo. App. W.D. 1978) (authorizing under pre–1994 Rule 51.05 change of judge after dispositional order). But Rule 126.01(c) deems supplemental petitions and motions to modify prior orders of disposition under chapter 211 not to be independent civil actions. "A supplemental petition and a motion to modify a prior order of disposition under chapter 211, RSMo, shall not be deemed an independent civil action" unless the judicial officer designated to hear the motion is not the same officer who heard the previous action. Rule 126.01(c); Resp't Sep. App. A1.

A petition to terminate parental rights is a petition under chapter 211. *See* § 211.447.1–.4, RSMo 2000; Rule 126.01(c); Resp't Sep. App. A1. A termination

petition can be a supplemental petition under chapter 211 when it is filed after a petition to adjudicate a child in need of care and treatment of the juvenile court. *See* § 211.031.1(1); Rule 126.01(c); Resp't Sep. App. A1. And a termination petition can effectively be a motion to modify a prior order of disposition under chapter 211 when it is filed after a dispositional order entered on a petition to adjudicate a child in need of care and treatment. *See* § 211.181; Rule 126.01(c); Resp't Sep. App. A1. Therefore, under Rule 126.01(c), a party's right to a change of judge is limited after a dispositional order has been entered.

Good policy reasons exist to limit judicial disqualifications after dispositional orders are entered. Parental rights can be terminated only when one or more statutory grounds for termination exists and when termination is in the best interest of the child. *See* § 211.447.5; *In re K.A.W.*, 133 S.W.3d 1, 9 (Mo. banc 2004). Both statutory grounds for termination and the best interest of the child involve "detailed consideration of the parent's past conduct as well as the parent's conduct following the trial court's assumption of jurisdiction" to predict the parent's future behavior. *Id*. A judicial officer who has previously heard the evidence supporting the court's assumption of jurisdiction over and temporary disposition of the child has advantages over a judicial officer who comes to the termination hearing a blank slate. The judicial officer is familiar with the entire history of the child's family and

of the relationship between the parent and the child and can decide the case more expeditiously and more accurately predict the parent's future behavior. An aphorism concisely states this principle: One family–one judge. *See generally*, National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* 19, 91 (1995) (*Resource Guidelines*).

Assigning one judge to one family allows the judge to become familiar with the "needs of children and families," "efforts over time made to address those needs," "complexities of each family's situation," "responses to court orders," and "patterns of behavior over time by all parties." *Resource Guidelines*, at 19. This familiarity leads to better decision making. "A judge who has remained involved with a family is more likely to make decisions consistent with the best interests of the child." *Resource Guidelines*, at 19.

Many states acknowledge that a parent can receive a fair termination hearing by a judge who has presided over the dispositional hearing. Those states require that actual bias must be shown to disqualify the judge. *See In re M.L.*, 965 P.2d 551, 557 (Utah 1998) and cases cited therein; *In re L.C.*, 788 A.2d 330, 332–33 (N.J. Super Ct. 2002); *In re Quick*, 559 A.2d 42, 46–47 (Pa. Super. Ct. 1989).

This case is a good example of the wisdom of the one family–one judge principle. Before the termination hearing was held on December 12, 2003, and January 9, 2004, Judge Frawley had already held three hearings and entered three orders — jurisdictional and dispositional hearings on June 10 and 12, 2002, and orders of June 17, 2002 (L.F. 84, 86, 91, 94) and a hearing on September 22, 2003, and order of October 8, 2003 (L.F. 272) on father's motion for change of temporary custody of his daughter. After the June 2002 and October 2003 orders were entered, father tried to prevent Judge Frawley from hearing any further evidence concerning the welfare of his daughter by filing in November 2003 his motion for change of judge. And, when that tactic was unsuccessful, father attempted to prevent Judge Frawley from considering at the termination hearing, evidence adduced at the jurisdictional and dispositional hearings and the hearing on his motion for change of temporary custody. *See* pages 51–55 herein. Finally, when that tactic was also unsuccessful, father tried to prevent this court from considering that evidence. *See* Motion to Exclude Supplemental Transcripts on Appeal. A crabbed and crimped vision of neglect and termination proceedings as discreet and divisible units that can be adjudicated by whatever judicial officer is at hand upon evidence artificially limited to each unit necessarily creates bad decision making.

In this case, the termination petition was filed on September 8, 2003. (L.F. 234.) The motion for change of judicial officer was filed within five days of November 4, 2003, when the termination petition was set by Judge Frawley for trial on December 18, 2003.[2] (L.F. 310, 311, 312.) But the jurisdictional and dispositional orders had been entered by Judge Frawley on June 17, 2002. (L.F. 84, 86, 91, 94.) After that date, the father's right to change of judge was limited to the circumstance of the designation of some judicial officer other than Judge Frawley to hear the termination petition. That circumstance does not exist.

Relying upon *Kyser*, Father argues that because a termination of parental rights proceeding is independent of a child neglect proceeding with a different purpose and a "stronger test" (though he does not explain what the different tests are) and a "unique hearing procedure" (though he again does not explain what is unique about termination procedures as they relate to neglect procedures) and because the termination statutes are a "code within itself" separate from the neglect statutes, he is entitled to a peremptory change of judge even after the temporary

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[2]The docket sheet indicates that the termination petition was set even earlier — on October 23, 2003, for trial on December 18, 2003. (L.F. 1.) But the Children's Division believes that this entry is an error.

custody of the child has been determined by a dispositional order. (Appellant's Substitute Br. at 27.) But father does not explain how any stronger test for termination and unique termination procedures compel that a peremptory change of judge be allowed. To the extent that termination procedures do require a stronger test and are unique, they serve to protect the parent from governmental overreaching. And by referring to a supplemental petition and a motion to modify a prior order of disposition "under chapter 211," Rule 126.01(c) rejects the concept that, insofar as a peremptory change of judge is concerned, termination proceedings are independent and separate and distinct from child neglect proceedings. *See* Rule 126.01(c).

Father also misunderstands that relative importance of judicial efficiency. (Appellant's Substitute Br. at 28.) The paramount justification for limiting the peremptory right to a change of judge is not improved judicial efficiency, but rather, as explained above, improved judicial decision making about the best interest of the child.

Because the motion for change of judge was filed after entry of the dispositional order, Judge Frawley had jurisdiction to hear and decide the termination petition.

II.

Substantial evidence supports termination of parental rights upon the grounds of abuse and neglect, failure to rectify, and parental unfitness. (Responds to father's Argument II.)

A. Standard of review

Parental rights may be terminated when the trial court finds that termination is in the best interest of the child and that it appears by clear, cogent, and convincing evidence that at least one statutory ground for termination exists. *See In re K.A.W.*, 133 S.W.3d 1, 9 (Mo. banc 2004); § 211.447.5, RSMo 2000.

A finding that a statutory ground for termination exists is reviewed under the *Murphy v. Carron* standard of review — the finding is affirmed unless it is supported by no substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *See K.A.W.*, 133 S.W.3d at 11; *In re W.B.L.*, 681 S.W.2d 452, 454 (Mo. banc 1984); *In re K.C.M.*, 85 S.W.3d 682, 689 (Mo. App. W.D. 2002).

In his second argument, father asserts that the grounds for terminating his parental rights are not supported by substantial evidence. Substantial evidence exists when truthful evidence has probative force upon, or tends to prove, the

issues. *See K.A.W.*, 133 S.W.3d at 9*; In re S.D.W.*, 702 S.W.2d 527, 529 (Mo. App. E.D. 1985). This court views the facts and reasonable inferences from the facts in the light most favorable to the judgment; the trial court determines the credibility of the witnesses and chooses between conflicting evidence. *See K.A.W.*, 133 S.W.3d at 11–12; *In re C.N.W.*, 26 S.W.3d 386, 393, 394 (Mo. App. E.D. 2000); *In re D.B.*, 916 S.W.2d 430, 432 (Mo. App. E.D. 1996); *In re L.*, 888 S.W.2d 337, 339 (Mo. App. E.D. 1994). Likewise, the trial court, not this court, determines whether the clear, cogent, and convincing standard of proof was met at trial. *See W.B.L.*, 681 S.W.2d at 454 (standard of review on appeal "not inconsistent" with standard of proof at trial); *S.D.W.*, 702 S.W.2d at 529.

This court must act with caution and reverse only if it firmly believes that the finding is wrong. *See C.N.W.*, 26 S.W.3d at 393; *L.*, 888 S.W.2d at 339.

B. Fifteen out of most recent twenty–two months

A child's being in foster care for fifteen out of the most recent twenty–two months is not a ground for termination. But satisfaction of only one ground for termination is sufficient to terminate parental rights if termination is in the child's best interests. *See In re M.D.R.*, 124 S.W.3d 469, 476–77 (Mo. banc 2004) (transferring case to court of appeals to review abandonment, abuse and neglect,

failure to rectify, and parental unfitness grounds for termination); *In re E.L.B.*, 103 S.W.3d 774 (Mo. banc 2003); § 211.447.5, RSMo 2000. Here, three grounds were present: the trial court terminated parental rights upon the grounds of abuse and neglect, failure to rectify the conditions that led to the assumption of jurisdiction, and parental unfitness. *See* § 211.447.4(2), (3), (6); Resp't Sep. App. A13–A17, A17–A25, A25–A27. And the trial court found that termination is in the best interests of the child. (Resp't Sep. App. A27–A31.)

Substantial evidence exists to support each of the grounds for termination and that termination is in the child's best interest. Therefore, the judgment terminating father's parental rights need not be reversed because it was based, in part, on the child's being in foster care for fifteen out of the most recent twenty–two months.

C. Abuse and neglect

Termination of parental rights upon the ground of abuse and neglect requires the trial court to "consider and make findings" on each of four "conditions or acts of the parent." § 211.447.4(2). When making these findings, it is sufficient for the trial court to state that one or more of these conditions or acts is irrelevant and why. *See In re Q.M.B.*, 85 S.W.3d 654, 659 (Mo. App. W.D. 2002). Proof of

even one condition or act is sufficient to support termination. *See id*; *R.L.P. v. R.M.W.*, 775 S.W.2d 167, 171 (Mo. App. E.D. 1989).

In this case, in its termination order, the trial court found that father had abused and neglected his daughter (Resp't Sep. App. A13) and made additional findings on the conditions or acts relating to father's failure to provide adequate food, clothing, shelter, education, or other necessary care (Resp't Sep. App. A16–17) and relating to father's mental condition (Resp't Sep. App. A14–A17). *See* § 211.447.2(a), (c). As to the conditions or acts relating to a chemical dependency and to severe acts of abuse, *see* § 211.447.2(b), (d), the trial court found that they were "irrelevant" because there was "no evidence" of them. (Resp. Sep. App. A31.) Under *Q.M.B.*, that finding is sufficient.

1. By reason of mental condition

The trial court found that father has a mental condition that is permanent or has no reasonable probability of reversal and that renders him unable to knowingly provide necessary, care, custody, and control of the child. (Resp. Sep. App. A14.) The trial court supported its finding by references to the opinions of two psychologists, Dr. Lisa Emmenegger and Dr. Joseph Daus, and to the testimony of the child's paternal grandfather. (Resp. Sep. App. A14–A16.) Their opinions and testimony are substantial evidence of father's mental condition.

Dr. Emmenegger performed a psychosexual assessment of father during the summer of 2002 and made a written report dated October 14, 2002. (Resp't Sep. App. A42.) Her assessment was performed as a result of Dr. Daus's suggestion that father was at risk for engaging in inappropriate and deviant sexual relationships because father, who was 35 years old, allowed a 16 year old girl to move in with him and fathered a child by her. (Resp't Sep. App. A42–43.) Though Dr. Emmenegger opined that father presented no sexual risk to his daughter (Resp't Sep. App. A46), she concluded that father "sees himself as an individual who makes friends easily and who knows how to charm or lie to get others to give him the thing that he wants, and he does not feel sorry for those whom he as gotten something from." (Resp't Sep. App. A45.) She opined that "of overriding concern relating to parenting issues" is father's "strikingly impaired judgment, lack of insight and immaturity" exhibited by his inability to understand that "a single, adult male taking in a troubled teenage girl is generally considered inappropriate and suspect in our society" and "to detect her apparent mental health issues;" when those issues were brought to father's attention (the mother threatened to kill their daughter), he continued to allow her to care for their daughter and stated that she had no parenting problems. (Resp't Sep. App. A42, A43–A44, A46.) Dr. Emmenegger also opined that father's "ability to protect [his daughter] and to make

appropriate judgments regarding her well being are questionable." (Resp't Sep. App. A46.) Ultimately, she opined that father has a "personality disturbance that typically presents in his anti–social attitudes and pronounced narcissism." (Resp't Sep. App. A46.)

Father had no objection at the hearing on his motion for modification of custody to the admission into evidence of Dr. Emmenegger's report, which was filed with the clerk a few weeks later. (Sep. 03 Tr. 118–119, 124; Supp. L.F. 8; Resp't Sep. App. A42.)

Dr. Daus's opinion was similar to Dr. Emmenegger's. Ultimately, he also opined that father's "proclivities appeared to be significantly associated with a very self–focused outlook (i.e., narcissistic disposition)" with a "grandiose sense of self–importance and omnipotence." (Resp't Sep. App. A38.) A child who grows up with a narcissistic care giver can experience "significant emotional challenges" because of the care giver's focus on self–aggrandizement, rather than on nurturing the child. (Resp't Sep. App. A38.) Father's test results indicated that his "habitual exploitation of others and his careless disregard for their rights are not necessarily hostile or malicious in character," but rather "derive from his shallow conscience, his lack of empathy, his attitude of omnipotent self–assurance, and his thoughtless indifference to the feeling of those he uses to enhance and indulge his

desires." (Resp't Sep. App. A39.) Father stated that for him to be considered in any manner neglectful was a "stupid bullshit charge." (Resp't Sep. App. A37; June 02 Tr. 80.) Dr. Daus had "intense concerns" about father's "long term parenting ability" because of his "previously displayed obvious confusion between the roles of a parental guardian and sexual partner" and "personality tendencies (e.g., egocentrism and entitlement) that, without successful treatment, make him significantly more likely" to engage in future inappropriate relationships. (Resp't Sep. App. A40–41.)

Dr. Daus testified to these matters at the jurisdictional and dispositional hearings in June 2002. (June 02 Tr. 44–45, 48, 53.) His report was entered into evidence at that hearing, without objection by father, and filed with the clerk that day. (June 02 Tr. 46, 56; Supp. L.F. 2; Resp't Sep. App. A34.)

Father does not contest these psychologists' observations and opinions except to challenge their admissibility at the termination hearing, which is discussed at pages 51–55, and the recency of Dr. Daus's opinion, rendered in June 2002 (Resp't Sep. App. A34), which is a matter of weight within the trial court's province. Also, a psychologist who father called to testify at the termination hearing, Dr. Robert Gennari, discussed below at pages 36–37, confirmed Dr.

Emmenegger's opinion of father's mental condition. Dr. Gennari diagnosed father with clinical narcissism. (Dec. 03 Tr. 25.)

That father's mental condition is not likely to be reversed and renders him unable to care for his daughter is revealed by his removing his daughter in June 2003 (the termination hearing was held in December 2003), contrary to the trial court's orders, from the custody of the person with whom he had placed her and taking her back to her mother, who had threatened to kill her and herself, had nine previous child abuse/neglect hotline reports, was diagnosed with manic depression and suicidal ideations, and who essentially did not contest the termination of her parental rights.[3] Then, father attempted to conceal his removal of his daughter. This incident is discussed at pages 9, 26, and 35 and at pages 44–45.

Father's unstable mental condition is corroborated by the child's paternal grandfather. He testified that around January or February 2002, when the mother left father's home for a while with the child who was around 3 months old, he had "regular contact" with the father and mother. (Dec. 03 Tr. 165–166.) When the mother left, father became very angry with the mother and her family and told his father that he wanted to take his gun and shoot "her, her family, and himself." (Dec.

[3]Nor does the mother appeal the termination of her parental rights.

03 Tr. 167.) Father had previously threatened to kill himself when in high school and other times too numerous to count. (Dec. 03 Tr. 170, 172.) One time, father went after his brother with a baseball bat, and his father took him to a psychiatrist, who prescribed medication, but he refused to regularly see the psychiatrist and to take his medication. (Dec. 03 Tr. 173–174.) As a result of this and because father was upsetting his family, his parents asked him to leave. (Dec. 03 Tr. 174.)

Father challenges the trial court's finding that the paternal grandfather had "regular contact" with him . (Resp't Sep. App. A16.) Though the grandfather testified that his contact with father was "sporadic," that was after the child was removed from custody (April 27, 2002) and up two about two months before the termination hearing (December 18, 2003), when the grandfather decided not to support father in his efforts to regain his daughter. (Dec. 03 Tr. 164.) The regular contact the grandfather testified about was in January or February 2002, when the child's mother left the home with the child for a while. (Dec. 03 Tr. 165–166.)

Father also challenges the trial court's finding that he threatened to shoot the "minor child." (Resp't Sep. App. A 16.) Though father did not specifically say his daughter, the paternal grandfather testified that father threatened to kill "her, her family, and himself." (Dec. 03 Tr. 167.) The trial court could reasonably infer that "her family" included his daughter.

2. By reason of failure to provide financial support

Abuse and neglect may be based on failure to provide financial support when able to do so. *See, e.g., Q.M.B.*, 85 S.W.3d at 659–660*; In re A.H.*, 9 S.W.3d 56, 59–60 (Mo. App. W.D. 2000)*; In re F.L.M.*, 839 S.W.2d 367, 372 (Mo. App. E.D. 1992)*; R.L.P.*, 775 S.W.2d at 171. Father does not challenge termination of his parental rights upon this ground.

The trial court found that father repeatedly and continuously failed, though physically and financially able, to contribute to the costs of care and maintenance of the child and to provide the child with the care and control necessary for her development and supported its finding by reference to testimony of Michelle Dean, with whom father had placed his daughter. (Resp't Sep. App. A16.) Her testimony is substantial evidence of father's failure to support his daughter. Since October 2003, father paid only $500.00 for support, and his daughter's day care costs alone were $125.00 per week. (Sep. 03 Tr. 92; Dec. 03 Tr. 186–187.)

In addition, father did not pay any child support before October 2002 or between October 2002, when he was ordered to do so, and December 2002, when the order was lifted. (Sep. 03 Tr. 58.) Between June 2002, when the jurisdictional and dispositional orders were entered, and September 2003, when the hearing on father's motion for modification of custody was held, father paid only $900.00 in

child support, plus a $200.00 gift card from a grocery store, but all after June 2003. (Sep. 03 Tr. 57, 104–105.)

3. Adequate notice and current evidence

Father suggests that he did not have adequate notice that termination might be based on abuse and neglect because the trial court never previously found him to have abused or neglected his daughter. But the trial court's jurisdictional order concluded that Dr. Daus had "intense concern" about his "long term parenting ability" and that father made statements that were "at best, inappropriate and, at worst, indicative for poor potential psychological functioning." (L.F. 88.)

And in any event, a termination petition that "tracks" the conclusory language of the termination statute is sufficient notice of the pendency of a termination proceeding and the charges to be defended against. *In re L.G.*, 764 S.W.2d 89, 93–94 (Mo. banc 1989); *see In re D.M.J.*, 683 S.W.2d 313, 314 (Mo. App. S.D. 1984) (petition charging neglect "in the language of the statute," is "clear notice" of conduct alleged to be basis for termination). Apart from requiring consideration of and findings on the four conditions or acts of the parent, the statute states only "the child has been abused and neglected." § 211.447.4(2). In this case, the termination petition tracked the language of the statute and alleged that father failed to provide his daughter with financial support. (L.F. 235.)

By his citation to *In re B.C.K. & K.S.P.*, 103 S.W.3d 319, 327–28 (Mo. App. S.D. 2003), father suggests that there was no evidence of current neglect, as there was not in that case. But the evidence of father's failure to financially support his daughter is as recent as the termination hearing, and there was no evidence that father's mental condition, diagnosed in the middle of 2002, did not continue for another year into 2003. And there is the evidence, discussed below at pages 44–45, of father removing his daughter from the custody of the Deans in June 2003 (the termination hearing was held in December 2003), contrary to the trial court's order, and taking his daughter back to her mother, who had threatened to kill her.

D. Failure to rectify

Termination of parental rights upon the ground of failure to rectify the conditions that led to the assumption of jurisdiction requires the trial court to "consider and make findings" on each of four factors — progress in meeting the terms of the social services plan, the success or failure of efforts to aid the parent to adjust his or her circumstances to provide a home for the chid, the mental condition of the parent, and whether the parent has a chemical dependency. § 211.447.4(3)(a)–(d); *see In re F.N.M.*, 951 S.W.2d 702, 705 (Mo. App. E.D. 1997). When making these findings it is sufficient for the trial court to state that the

condition is irrelevant and why. *See In re N.S.*, 77 S.W.3d 655, 657 (Mo. App. E.D. 2002). These four factors are not separate grounds for termination, but rather are "categories of evidence"to be considered with all other relevant evidence. *In re A.S.*, 38 S.W.3d 478, 483 n.3 (Mo. App. S.D. 2001).

In this case, in its termination order, the trial court made a finding that the child has been under the jurisdiction of the court for a period exceeding one year and that the conditions that caused the court to assume jurisdiction over the child or conditions of a potentially harmful nature continue to exist and will not be remedied at an early date to permit return of the child in the near future to the father and, in all events, continuation of the parent/child relationship greatly diminishes the prospects of early integration of the child into a stable and permanent home. (Resp't Sep. App. A13, A17.)

The trial court also made findings on the "categories of evidence" that father made insufficient progress toward satisfaction of his obligations entered under its order of June 17, 2002 (Resp't Sep. App. A19), the Division of Family Services was unsuccessful in its efforts to assist him in adjusting his circumstances and conditions to be able to provide on a continuing basis a proper home for the child (Resp't Sep. App. A21), and father has a mental condition that is permanent or has no reasonable probability of reversal and renders him unable to knowingly provide

necessary, care, custody, and control for the child (Resp't Sep. App. A 22). *See* § 211.447.4(3)(a), (b), (c). As to the category of evidence of chemical dependency, *see* § 211.447.4(3)(d), the trial court found that it was "irrelevant" because there was "no evidence" of it. (Resp. Sep. App. A31.)

1. Mental condition

The trial court's jurisdictional order found that Dr. Daus had "intense concern" about father's "long term parenting ability" and that father made statements that were "at best, inappropriate and, at worst, indicative for poor potential psychological functioning." (L.F. 88.) With respect to the mother, the jurisdictional order found that the mother stated she would kill herself and her daughter if father tried to take their daughter. (L.F. 88.) The order also found that the mother had nine previous child abuse/neglect hotline reports, was admitted to a hospital behavioral center the previous month, her treating psychiatrist's impressions were borderline personality disorder with recurrent suicidal gestures and chronic suicidal ideation, her symptoms were likely to result in personality disorder with poor judgment, and an earlier diagnosis of manic depression and suicidal ideations was confirmed. (L.F. 88–89.)

The trial court referred to the testimony of Dr. Roger Gennari, a psychologist, Steve Franklin, a licensed clinical psychologist, and Dr. Jo–Ellen

Ryall, a psychiatrist, all of which father called to testify, to support its conclusion that father suffered from a mental condition. (Resp't Supp. App. A22–A25.) Their testimony is substantial evidence that father suffered from the mental condition of clinical narcissism that was not likely to be reversed and that rendered him unable to care for his daughter. He declined an offer of a service plan to improve the intimacy of his relationships.

Dr. Gennari conducted four diagnostic interviews with father for the purpose of evaluating whether he was a sex offender — he was following up on Dr. Emmenegger's recommendation and reviewed her evaluation and testing. (Dec. 03 Tr. 19, 20.) He opined that father is not a pedophile or hebephile. (Dec. 03 Tr. 22, 29–30; Resp't Sep. App. A57.) Father is not in need of more treatment before he could have custody of his daughter and be an adequate parent only insofar as his sexuality is concerned. (Dec. 03 Tr. 32–33.) He did not meet with father and his daughter to watch them interact, to evaluate their emotional ties, or to evaluate father's parenting abilities. (Dec. 03 Tr. 30–31.)

But Dr. Gennari also opined that father is "clinically narcissistic," marked by an inflated self–concept and grandiosity that covers up a low self–concept and chronic yearning for love, attention, and concern. (Dec. 03 Tr. 25.) Father lacks insight into himself, has poor judgment, is very self–focused, and loses sight of

what others think or feel about him. (Dec. 03 Tr. 24; Resp't Sep. App. A57.) Father's relationship with the mother "betrays an incredible naivete and unawareness of the consequences." (Dec. 03 Tr. 24; Resp't Sep. App. A57.) Rather than sexual abuse, father's real difficulty is "this naivete and poor judgment, coupled with his self–focusing." (Dec. 03 Tr. 24; Resp't Sep. App. A57.) To help father with his narcissism, Dr. Gennari offered therapy, which father declined. (Resp't Sep. App. A49.)

Steve Franklin assessed whether father, whom he met three times, had any psychological problem that would interfere with him being a good parent. (Dec. 03 Tr. 42, 43, 61, 72.) He had the reports of Dr. Gennari, Dr. Emmenegger, Dr. Ryall, but not of Dr. Daus. (Dec. 03 Tr. 42, 43, 44, 56.) Like Dr. Gennari, he opined that father was not a pedophile, but that he does not have the kind of intimacy in his relationships that most people have and would have difficulty understanding his daughter's needs and how to share himself emotionally with her that would adversely impact his ability to parent. (Dec. 03 Tr. 47, 55–56, 72; Resp't Sep. App. A59.) To treat that problem so father could improve his intimacy with his daughter and personal relationships in general, Franklin offered father a service plan directed to reunification with his daughter, including individual counseling, that father chose not pursue. (Dec. 03 Tr. 47–48, 56, 71; Resp't Sep. App. A60.)

Franklin did not think that father had a psychological disorder, but admitted that if father were diagnosed with narcissism, he would "refrain from drawing conclusions" until he better understood the diagnosis. (Dec. 03 Tr. 47, 66.) And he admitted that if father had been untruthful with him, he would re–examine his conclusions. (Dec. 03 Tr. 62.) Franklin was unaware that father had received psychiatric treatment and medication in the past, physically fought with his brother, and threatened to kill the mother, her family, and himself. (Dec. 03 Tr. 52, 53, 54.)

Dr. Ryall, a board certified psychiatrist, evaluated whether father, whom she met for only one hour and never saw with his daughter, had a mental illness. (Dec. 03 Tr. 75, 76–77, 83.) She had the reports of Dr. Gennari and Dr. Emmenegger, but not of Dr. Daus, which she saw after she conducted her evaluation, and performed no testing. (Dec. 03 Tr. 77, 84–85, 87.) She opined that father did not have a psychiatric illness. (Dec. 03 Tr. 80.) The trial court explicitly credited only this portion of her testimony, because she conducted only one interview with father, who did not tell her of his threat to kill the mother, her family, and himself and did tell her that his daughter was living with him, when his daughter was actually living with the Deans. (Resp't Sep. App. A24, A25 n. 5; Dec. 03 Tr. 87, 89, 93.)

2. Insufficient progress on social services plan

The trial court referred to the testimony of the social service worker, Shonetta Reed, and father to support its conclusion that father made insufficient progress toward satisfaction of his obligations under the dispositional order of June 17, 2002. (Resp't Sep. App.A19.) Among other things, that order required father to obtain and maintain appropriate housing with working utilities and to enroll in and successfully complete and provide proof of completion of individual counseling, but did not require him to maintain regular employment because at that time, father was employed in a part time in a full time position by Schnuck's Markets. (L.F. 97; Sep. 03 Tr. 27.)

Father moved into a home on Michigan Street when he left the Deans' home in June 2003, but he did not invite the social service worker to inspect it until the week before the hearing on his motion to change temporary custody. (Sep. 03 Tr. 10, 31, 41, 50.) The worker was not allowed to see the upper floor and for furnishings, she saw only an air mattress and a kitchen table, no child's toys. (Sep. 03 Tr. 50.) The home was not appropriate for a child. (Dec. 03 Tr. 51, 141.) Since that hearing and before the termination hearing, father moved into a home on Gasconade Street. (Dec. 03 Tr. 162.) The worker had only three days within which to examine it before the first day of the termination hearing, and could not do so. (Dec. 03 Tr. 129, 138.) Father did not contact the worker again to see his

home, and the worker did not have another opportunity to see it. (Dec. 03 Tr. 126, 138, 143.)

Throughout these proceedings, father was self–employed as a landscaper, but the amount of work varied with the season. (Sep. 03 Tr. 11.) At different times, he also was employed part time for Schnuck's Markets in a full time position and by Kohl's Department Store . (Sep. 03 Tr. 11–12, 27.) Father claimed he earned $60,000 to $80,000 per year from his landscaping business, but his tax returns for 2001 and 2002, supplied only after the first day of the termination hearing, showed he earned only about $20,000 for both those years. (Sep. 03 Tr. 28, 124–125, 140, 157–158.)

Father did not obtain any individual counseling, though both Dr. Gennari and licensed clinical social worker Franklin offered such counseling. (Dec. 03 Tr. 47–48, 56, 71, 125–126, 141, 142; Resp't Sep. App. A49, A57, A59–60.)

3. Unsuccessful efforts to aid father

The trial court again referred to the testimony of Reed and father to support its conclusion that the Children's Division was unsuccessful in its efforts to assist father to adjust his circumstances and conditions to enable him to provide a proper home. (Resp't Sep. App. A21.) Father admitted that the order of December 2002 determined he was an appropriate custodian for his daughter so long as he resided

with the Deans. (Sep. 03 Tr. 36–37.) But he also told the social service worker from the beginning that he does not want to and cannot care for his daughter himself. (Sep. 03 Tr. 53–54, 61.) Father was not the primary caretaker of his daughter at the Deans even when he was residing there and did not intend to be the primary caretaker even if he was awarded temporary custody or did not have his parental rights terminated. (Sep. 03 Tr. 65–66, 68–69, 75–77, 80–81, 112, 156.)

Father's citation to *In re S.J.H.*, 124 S.W.3d 63 (Mo. App. W.D. 2004) is not helpful because, unlike in that case, the trial court here focused on whether there has been progress toward assisting father to adjust his circumstances and conditions to enable him to provide a proper home. (Resp't Sep. App. A21.) As demonstrated by father's continued insistence that he would not be the primary caretaker of his daughter, there was not any such progress. Father's citation to the *K.A.W.* case is not helpful because if was for the trier of fact to attach little weight to father's testimony that he wanted to parent his daughter and even the Children's Division early plan to reunite father with his daughter. *In re K.L.S.*, 119 S.W.3d 548 (Mo. App. E.D. 2003), which he also cites, is not helpful because it involves the withdrawal of a voluntary termination of parental rights.

E. Parental unfitness

Termination of parental rights for parental unfitness is authorized for "a consistent pattern of committing a specific abuse" and for "specific conditions directly relating to the parent and child relationship." § 211.447.4(6); *In re C.W.*, 64 S.W.3d 321, 325–26 (Mo. App. W.D. 2001). Regardless of whether termination is for specific abuse or specific conditions, the abuse or conditions must "be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental or emotional needs of the child." § 211.447.4(6). The trial court must examine "whether, from the child's perspective, the amount of time necessary for the parent to overcome the barriers to reunification is unreasonable, as measured by the child's need for permanency at the earliest possible date." *C.W.*, 64 S.W.3d at 326, quoting Roya R. Hough, *Juvenile Law: A Year in Review*, 63 Mo.L.Rev. 459, 466 (1998). Parental unfitness describes "a parent that continues to have parenting problems that endanger a child coupled with an inability to remedy those problems within the reasonably foreseeable future." *In re K.A.W.*, 133 S.W.3d at 20.

In this case, in its termination order, the trial court found that father was unfit to be a party to the parent and child relationship because of specific conditions relating to his relationship with his daughter that are of a duration and nature rendering him unable for the reasonably foreseeable future to care appropriately for

the ongoing physical, mental, and emotional needs of his daughter. *See* § 211.447.4(6); (Resp't Sep. App. A25.) And the trial court supported its findings by reference to evidence adduced either by father himself or in response to father's testimony at the hearing on his motion to change temporary custody of his daughter. (Resp't Sep. App. A25–A26.) That evidence is substantial evidence of father's parental unfitness by reason of placing his daughter with her mother, whom the trial court had found to be an inappropriate placement, and then concealing that placement.

Father does not challenge termination of his parental rights upon the parental unfitness ground. Usually, parental rights cannot be terminated upon a ground that is not pleaded in the petition. *See In re H.R.R.*, 945 S.W.2d 85, 88 (Mo. App. W.D. 1997). Parental unfitness was not pleaded as a ground for termination of father's parental rights (L.F. 235–236), but father should not now be permitted to complain that he did not have notice that his parental rights may be terminated upon this ground when the evidence supporting it was before the trial court as the result of his motion to change custody.

1. Substantial evidence of parental unfitness

Father acknowledges that the trial court's December 23, 2002, order found him to be an appropriate placement for his daughter only so long as he resided with

the Deans and that the June 5, 2003, family support team meeting did not authorize the mother to have overnight visitation with her daughter. (Sep. 03 Tr. 36, 37.) Yet without prior notice to the Children's Division or the guardian ad litem and without prior approval of the court, father left his daughter with her mother, who was living with her boyfriend. (Sep. 03 Tr. 21, 39, 52, 92, 95.) Neither father, when he called the social service worker and informed her that he was working with the mother to raise his daughter, nor the mother informed the worker that the child was with the mother. (Sep. 03 Tr. 41–42, 53.) At the hearing, father admitted that moving his daughter from the Deans's residence to her mother's was a violation of the court's order that the mother was an inappropriate placement, but that he had no respect for the order because his daughter should not have been removed from his and the mother's home. (Sep. 03 Tr. 37, 54.)

In addition, father was never the primary caretaker of his daughter when he and she resided with the Deans, did not intend to be the primary caretaker even if he was given temporary custody or did not have his parental rights terminated, and told the social service worker throughout the proceedings that he does not want to and cannot care for his daughter. (Sep. 03 Tr. 53–54, 61, 65–66, 68–69, 75–77, 80–81, 112, 156.)

Father argues that this case is like *A.S.W.*, where this court said that the parental rights of a brain–damaged father cannot be terminated because, without assistance, the father "lacks the ability to care" for his child. *In re A.S.W.*, 137 S.W.3d 448, 449–450, 453 (Mo. banc 2004). But here, father does not suffer from a physical injury or condition that limits his ability to care for his daughter by himself. Rather, father is unwilling to care for his daughter.

III.

Substantial evidence supports that termination of father's parental rights was as in the best interest of his daughter. (Responds to father's Argument III.)

A. Standard of review

A finding that termination is in the best interest of the child is affirmed unless the trial court abused its discretion. *In re K.C.M.*, 85 S.W.3d 682, 689 (Mo. App. W.D. 2002); *In re A.S.*, 38 S.W.3d 478, 487 (Mo. App. S.D. 2001); *In re L.*, 888 S.W.2d 337, 341 (Mo. App. E.D. 1994). An abuse of discretion occurs when the finding is "so clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a careful lack of consideration." *A.S.*, 38 S.W.3d at 486. The best interest of the child is based upon the totality of the evidence, which the trial court weighs and this court does not reweigh. *See In re A.T.*, 88 S.W.3d 903, 909 (Mo. App. S.D. 2002); *In re L.*, 888 S.W.2d 337, 341 (Mo. App. E.D. 1994).

B. Best interest of the child and termination

Missouri has a two–step procedure for terminating parental rights. When at least one statutory ground for termination has been proven, the trial court must also find that termination is in the best interest of the child. *See* § 211.447.5, RSMo 2000; *In re K.C.M.*, 85 S.W.3d 682, 690 (Mo. App. W.D. 2003). When considering whether termination is in the best interest of the child, *see K.C.M.* at 692, the trial court must make findings only on those factors that are "appropriate and applicable to the case," rather than on all statutory factors. § 211.447.6; *see K.C.M.* at 697. Those factors are commonly, not statutorily, called "best interest " factors. *See K.C.M.* at 690. The termination statute leaves it to the trial court's discretion to make findings on those best interest factors it deems applicable to the case. *See A.S.*, 38 S.W.3d 478, 487 (Mo. App. S.D. 2001); *In re M.H.*, 859 S.W.2d 888, 897 (Mo. App. S.D.1993).

Even if the evidence of a best interest factor is insufficient, termination is in the best interest of the child when at least one best interest factor is appropriate and applicable and supported by substantial evidence. *See M.H.*, 859 S.W.2d at 897. When termination is upon the ground of parental unfitness, the trial court need not consider the statutory, best interest factors at all. *See* § 211.447.4(6); § 211.447.6; *K.C.M.*, 85 S.W.3d at 693–694. Whether termination for parental unfitness is in the best interest of the child is simply left to the sound discretion of the trial court.

K.C.M., 85 S.W.3d at 693. Only a preponderance of the evidence is required to prove that termination is in the best interest of a child. *See K.C.M.*, 85 S.W.3d at 690.

C. The best interest factors

In this case, the trial court found three best interest factors — the irrelevance of his daughter's emotional ties to father in light of father's inability to adjust his circumstances and comply with the order of June 17, 2002, and his daughter's need for permanence; the inability of additional services to bring about parental adjustment to enable his daughter to return in an ascertainable period of time; and father's disinterest in his daughter. (Resp't Sep. App. A27–29.) The trial court supported its findings by reference to the testimony of Michelle Dean and the social service worker. (Resp't Sep. App. A27–30.) Their testimony is substantial evidence that termination is in the best interest of father's daughter.

"From the beginning," father told the social service worker that he did not want to be the primary caretaker of his daughter. (Dec. 03 Tr. 144–145; Sep. 03 Tr. 61, 68–69.) He also told the worker and Michelle Dean that he wanted Michelle to raise his daughter because he wanted his daughter to have a mother and that he would move his daughter to the Deans if he were granted custody. (Sep. 03 Tr.

53–54, 65–66, 88–89.) Father wanted his daughter to live full time with the Deans; he would only visit. (Sep. 03 Tr. 75–76.)

When father and his daughter lived with the Deans, Michelle, not father, was the primary care giver. (Sep. 03 Tr. 80–81.) His daughter began to live with the Deans in July 2002, but father did not stay there all the time, particularly after March 2003 when the mother returned to Missouri, and when father lived with a friend, he was at the Deans only 3 hours a day. (Sep. 03 Tr. 89, 95, 110.)

After father left the Deans with his daughter in June 2003 he did not return to live with them. (Sep. Tr. 03 95.) Michelle Dean was not confident that if father had custody of his daughter, he would leave her with him to raise — he threatened her with he and his daughter being a "package deal" and left with his daughter when they had a dispute. (Sep. 03 Tr. 96, 106, 112–113.) Michelle feared that "if he got mad at me" — she did not do what father wanted or did permit him to do what he wanted — father would punish her by taking away his daughter. (Sep. 03 Tr. 113.) This is an example of the narcissism, placing himself before others, including his daughter, that father's personality exhibited.

Father argues that this case is like *K.A.W.*, where this court said that a mother's efforts, not motivated by personal gain, to find an adoptive family for her twins that would allow her to retain contact with her twins, without more, could not

be a ground for termination. *See In re K.A.W.*, 133 S.W.3d 1, at 21 (Mo. banc 2004). But here, the issue is not a ground for termination, but whether father's disinterest in his daughter — only one of the three statutory best interest factors the trial court found to exist — is sufficient evidence that termination of father's parental rights would be in the best interest of his daughter. Here, father's disinterest in his daughter — to the extent that he did not want to be her primary caretaker, wanted Michelle Dean to raise her, would move his daughter to the Dean's residence even if he were granted custody and only visit her, and would use his daughter as leverage to extract from the Deans concessions that he wanted in his relationship with them — certainly supports the conclusion that termination of his parental rights would be in his daughter's best interest.

IV.

The trial court properly admitted into evidence at the termination hearing psychological evaluation reports that were admitted into evidence without objection at prior hearings and filed with the clerk before the termination hearing, and one of the reports' authors testified and was cross examined at a prior hearing. (Responds to father's Argument IV.)

A. Standard of review

It is nearly impossible to reverse the judgment in a court–tried case for erroneous admission of evidence. *See In re S.T.W.*, 39 S.W.3d 517, 518 (Mo. App. S.D. 2000). Reversal occurs only when, after exclusion of the inadmissible evidence, the remaining evidence is not sufficient to support the judgment. *See id.*

In this case, the psychological evaluation reports of Dr. Joseph Daus and Dr. Lisa Emmenegger were properly admitted into evidence at the termination hearing, and their opinions expressed in their reports properly relied upon by the trial court in concluding that termination could be based upon the ground of abuse and neglect by reason of a mental condition. If they were not properly admitted, sufficient evidence remains to support termination on other grounds.

B. The reports were properly admitted

Evidence adduced at prior hearings, such as jurisdictional, dispositional, and review hearings and hearings on motions to modify temporary custody orders, can be considered at the hearing on the petition to terminate parental rights. *See In re S.T.W.*, 39 S.W.3d at 519 ("On review we take judicial notice of prior proceedings in juvenile court"); *In re R.L.L.*, 633 S.W.2d 409, 412 (Mo. App. W.D. 1982). Father describes *R.L.L.* as holding that evidence admitted at prior hearings may not be considered at the termination hearing. But the appellate court in that case did not limit itself to considering solely termination hearing evidence.

The issue in *R.L.L.* was whether evidence confined, on the parent's objection, solely to the period after the court took jurisdiction was sufficient to show the conditions that led to the assumption of jurisdiction. *See id.* at 410. It was not. *See id.* at 411.

Even the juvenile officer in *R.L.L.* believed that jurisdictional and dispositional evidence could not be considered at the termination hearing. "Actually, the juvenile officer does not claim that the evidence on the prior hearing was entitled to consideration by the court in the second hearing, but we have considered the question sua sponte." *Id*. at 412. But the appellate court disagreed.

The appellate court ordered a transcript of the jurisdictional and dispositional hearing prepared and filed. *See id.* at 411. After considering the evidence adduced at all the hearings, the appellate court held that substantial evidence did not exist that the parent failed to rectify the conditions that led to the assumption of jurisdiction. *Id*. As pointed out before, past conduct is a good indicator of future conduct. *See In re K.A.W.*, 133 S.W.3d 1, 9 (Mo. banc 2004).

In this case, Dr. Daus's report was admitted into evidence without objection at the jurisdictional hearing (June 02 Tr. 46, 56) and filed with the clerk that day. (Supp. L.F. 2). In addition, Dr. Daus was called to testify and did testify at the jurisdictional and dispositional hearings twice, first by the juvenile officer and then by the guardian ad litem. (June 02 Tr. 44, 106.) The second time he was called to testify, the trial court informed the parties that he could be cross examined on the entire case. (June 02 Tr. 106.) Father cross examined Dr. Daus each time. (June 02 Tr. 60–63, 111–113.)

Though she did not testify at any hearing, Dr. Emmenegger's report was admitted into evidence without objection at the hearing on father's motion for modification of the temporary custody order (Sep. 03 Tr. 118–119, 124) and filed with the clerk a few weeks later (Supp. L.F. 8; Resp't Sep. App. A42).

Father argues that he did not have an opportunity to cross examine Drs. Daus and Emmenegger. But he did cross examine Dr. Daus twice, and he waived any objection he may have had to Dr. Emmenegger's report by not objecting to it when first offered into evidence.

Father also argues that without Dr. Daus's and Dr. Emmenegger's testimony, their reports were hearsay. But where expert opinions are contained in reports admitted into evidence, and the experts testify to their opinions that are independently admissible, admission of the reports is not error. *See In re V.M.O.*, 987 S.W.2d 388, 391–92 (Mo. App. W.D. 1999) (social study containing evaluations of five psychologists and eight therapists); *In re J.A.R.*, 968 S.W.2d 748, 751–52 (Mo. App. W.D. 1998) (social study containing information held by counselor). Dr. Daus did testify. And father waived any hearsay objection he may have had to Dr. Emmenegger's report by not lodging it when it was first offered into evidence.

C. If the reports were not properly admitted, sufficient evidence to support termination remains

Even if Dr. Emmenegger's report was improperly admitted into evidence at the termination hearing, sufficient evidence remains to support termination upon the

ground of abuse and neglect by reason of mental condition. Dr. Daus testified and was cross examined twice at the jurisdictional and dispositional hearings, and the trial court relied upon his testimony to support its judgment of termination upon that ground. (Resp't Sep. App. A14–A16.)

And even if both reports were improperly admitted into evidence, sufficient evidence remains to support termination upon the grounds of abuse and neglect by reason of failure to provide financial support, failure to rectify, and parental unfitness. The trial court did not rely on Drs. Daus and Emmenegger to support its judgment of termination upon those grounds. (Resp't Sep. App. A16, A22–A25, A25–A26.)

V.

Testing expert witnesses' opinions by cross examination with questions about facts that were later introduced into evidence is proper. (Responds to father's Argument V.)

A. Standard of review

The extent and scope of cross examination in a civil case is within the discretion of the trial court and will not be disturbed unless an abuse of discretion is clearly shown. *See Litton v. Kornbrust*, 85 S.W.3d 110, 113 (Mo. App. W.D. 2002). An abuse of discretion exists when the trial court's ruling is "clearly against the logic of the circumstances and so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Id*.

B. The questions and facts contained in them

Wide latitude is afforded cross examination of expert witnesses to test the value, accuracy, and factual basis of their opinions. *See State v. Dewey*, 86 S.W.3d 434, 439 (Mo. App. W.D. 2002). That latitude extends to questions about

facts not in or not admissible in evidence. *See id.* at 441; *State v. Rowe*, 838 S.W.2d 103, 110 (Mo. App. E.D. 1992).

On direct examination by father, Stephen Franklin, a licensed clinical social worker, testified that he assessed whether father had any psychological problem that would prevent him from being "an adequate and safe parent" and found only that he had a relational problem where he chose not to accept intimacy into his life. (Dec. 03 Tr. 42, 45, 46, 47.) Also on father's direct, Jo–Ellen Ryall, a psychiatrist, testified that she interviewed father and assessed whether he had any psychiatric illness and found only an adjustment reaction to the removal of his daughter from his custody. (Dec. 03 Tr. 77, 80.)

On cross examination by the Children's Division, Franklin testified that he had nothing in his file about father's history. (Dec. 03 Tr. 50.) In order to determine whether father's history "would change your opinion in any way" (Dec. 03 Tr. 52), counsel asked Franklin about father's "fighting with his brothers physically." (Dec. 03 Tr. 53.) He would need "to know more than that." (Dec. 03 Tr. 53.) Also on cross, counsel asked Dr. Ryall whether she learned that father had

made threats to his daughter's mother.[4] (Dec. 03 Tr. 91.) She had not. (Dec. 03 Tr. 91.)

The trial court permitted these questions, and many others not referred to by father, because father's witnesses were called first, out of order, and cautioned counsel for the Children's Division to prove up in her case what she intended to ask on cross examination. (Dec. 03 Tr. 51–52.) Though, strictly speaking, the facts contained in her questions need not be admitted or even admissible into evidence, counsel for the Children's Division did prove up that father fought with his brother with a baseball bat and that he threatened to kill the mother, her family, and himself. (Dec. 03 Tr. 167, 173.) That only the paternal grandfather and not his entire family testified to father's fighting with his brother is insignificant, a matter of weight of the grandfather's testimony within the trial court's province.

The trial court restricted the Children's Division's cross examination more than the law required it to, and the Children's Division met the trial court's

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[4]Father misunderstands the question to be about his mother, who apparently is deceased, rather than about his daughter's mother. There was no testimony that father threatened his mother.

restrictions. The trial court did not abuse its discretion, nor did counsel ask any unfair question. Her questions contained a basis in fact that she proved.

CONCLUSION

For the reasons stated above, the judgment terminating parental rights should be affirmed.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that one copy and one computer diskette of the foregoing were served by first–class mail, postage prepaid, this day of ___ day of December, 2004, upon:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 12,075 words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus–free.

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